IN THE UNITED STATES BANKRUPTCY COURT FOR THE EASTERN DISTRICT OF TENNESSEE

In re

Case No. 01-32744

PATRICIA MICHELLE MILLER

Debtor

PATRICIA MICHELLE MILLER

Plaintiff

v. Adv. Proc. No. 01-3076

PENNSYLVANIA HIGHER EDUCATION ASSISTANCE AGENCY/STUDENT LOAN SERVICING CENTER, SALLIE MAE SERVICING CORPORATION, and JUNIATA COLLEGE

Defendants

NOTICE OF APPEAL FILED: October 18, 2004

DISTRICT COURT NO.: 3:05-CV-38

DISPOSITION: Affirmed by United States District Judge Thomas Varlan.

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Defendants

MEMORANDUM ON REMAND

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RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

The trial of this adversary proceeding was held on April 30, 2002, upon the Complaint filed June 11, 2001, by the Plaintiff/Debtor for a determination that repayment of her student loan obligations owed to the Defendant, Pennsylvania Higher Education Assistance Agency, would be an undue hardship and thus, dischargeable under 11 U.S.C.A. § 523(a)(8) (West 1993 & Supp. 2001). On May 6, 2002, the court entered its Judgment and corresponding Memorandum finding that the Debtor did not establish that repayment of her student loan debt would constitute an undue hardship, but nevertheless, using its powers pursuant to 11 U.S.C.A. § 105(a) (West 1993) to grant the Debtor a partial discharge of her loans.

The Defendant appealed the Judgment to the United States District Court for the Eastern District of Tennessee, which affirmed the decision of the bankruptcy court by virtue of its Order and Memorandum Opinion entered on December 18, 2002. The Defendant then appealed the decision to the Sixth Circuit Court of Appeals, which reversed and remanded the decision on July 28, 2004. *See Miller v. Pa. Higher Educ. Assistance Agency (In re Miller),* 377 F.3d 616 (6th Cir. 2004). Upon remand, the Sixth Circuit directed the bankruptcy court to "determine if [the Debtor] has shown undue hardship with respect to the portion of her educational loans that were discharged." *Miller*, 377 F.3d at 624.

I

Although the facts and record before the court are fully set forth in the court's May 6, 2002 opinion, the court will restate the following material facts. At the time of trial, the Debtor was indebted to the Defendant in the amount of $89,832.16, representing fifteen separate educational loans obtained between 1984 and 1996. Through these loans, the Debtor obtained an undergraduate degree in philosophy from Juniata College in 1988 and a Master of Arts degree in philosophy from the

University of Tennessee in 1992. The Debtor also took course work between 1992 and 1997 at the University of Tennessee to receive a Doctorate of Philosophy; however, she did not complete the requirements for the degree.

Despite her completed degrees, at the time of trial, the Debtor worked as a full-time administrative assistant for Nova, Inc., a local construction company, for $10.50 per hour and part-time as a call-center representative for America's Collectibles Network at a rate of $9.58 per hour. Her gross monthly income as of October 23, 2001, was $2,197.00, with a net monthly income of $1,685.96. Her scheduled monthly expenses totaled $1,646.10, and included $90.00 for a land-line telephone, $40.00 for a cell phone, $45.00 for cable, $25.00 for internet, rent of $385.00, a $210.00 car payment, and $50.40 invested in an IRA. Other monthly expenses included on the Debtor's Schedule J - Current Expenditures of Individual Debtor(s), entered into evidence as a portion of Trial Exhibit 7, but not expressly mentioned in the court's May 6, 2002 Memorandum, are $75.00 for electricity (utilities), $275.00 for food, $75.00 for clothing, $30.00 for laundry/dry cleaning expenses, $40.00 for medical and dental expenses, $110.00 for transportation expenses not including her car payment, $10.00 for recreation expenses, including newspapers and subscriptions, $40.00 for automobile insurance, $45.00 for vet bills/pet care, $50.00 for personal care, and $100.00 for auto repairs and maintenance.[1]

[1] At trial, the Debtor introduced as Trial Exhibit 10 a document entitled "Debtor's Budget," which shows monthly expenses of $1,705.10 and monthly income from all sources of $1,750.19. Trial Exhibit 10 differs from the Debtor's Schedule J as follows: (1) the rent expense increased to $395.00; (2) a new entry for "Newspaper, magazines, books (including school books)" in the amount of $15.00; (3) a new entry for "Vitamins, herbs (depending upon funds available)" in the amount of $25.00; and (4) a new entry for "Bank charges" in the amount of $9.00. Trial Exhibit 10 also included the Debtor's income from her part-time job, which was not included on her Schedule I - Current Income of Individual Debtor(s), introduced into evidence as part of Trial Exhibit 7.

Additionally, at the time of trial, the Debtor was thirty-five years old and single, with no dependents. Since 1997, she had made payments totaling $368.00 towards her student loan obligation to the Defendant, and she had not sought to consolidate her loans. Finally, as a result of her Chapter 7 discharge entered on September 27, 2001, the Debtor discharged unsecured debt in the aggregate amount of $17,997.41, plus a student loan debt to Juniata College of $3,280.32.

II

11 U.S.C.A. § 727 (West 1993) provides for a general discharge of a Chapter 7 debtor's pre-petition debts. Section 727(b), however, limits the discharge to those debts "[e]xcept as provided in section 523 of this title . . . ." 11 U.S.C.A. § 727(b). Section 523(a), governing the nondischargeability of certain debts, provides, in material part:

> (a) A discharge . . . does not discharge an individual debtor from any debt—
>
> . . . .
>
> > (8) for an educational benefit overpayment or loan made, insured or guaranteed by a governmental unit, or made under any program funded in whole or in part by a governmental unit or nonprofit institution, or for an obligation to repay funds received as an educational benefit, scholarship or stipend, unless excepting such debt from discharge under this paragraph will impose an undue hardship on the debtor and the debtor's dependents[.]

11 U.S.C.A. § 523(a)(8). In its May 6, 2002 Memorandum, the court applied the following test for showing an undue hardship under § 523(a)(8):

> (1) that the debtor cannot maintain, based on current income and expenses, a "minimal" standard of living for herself and her dependents if forced to repay the loans;
>
> (2) that additional circumstances exist indicating that this state of affairs is likely to persist for a significant portion of the repayment period . . .; and
>
> (3) that the debtor has made good faith efforts to repay the loans.

Tenn. Student Assistance Corp. v. Hornsby (In re Hornsby), 144 F.3d 433, 437(6th Cir. 1998) (quoting *Cheesman v. Tenn. Student Assistance Corp. (In re Cheesman),* 25 F.3d 356, 359 (6th Cir. 1994) (quoting *Brunner v. N.Y. State Higher Educ. Servs. Corp.*, 831 F.2d 395, 396 (2d Cir. 1987) (per curium)). Additionally, the Debtor was required to prove undue hardship by a preponderance of the evidence. *Daugherty v. First Tenn. Bank (In re Daugherty)*, 175 B.R. 953, 955 (Bankr. E.D. Tenn. 1994).

After applying the foregoing test, the court found that "the Debtor has not met this burden - particularly as to *Brunner*'s second and third prongs - and accordingly her debt to [the Defendant] cannot be fully discharged." *Miller v. Pa. Higher Educ. Assistance Agency (In re Miller),* No. 01-3076, slip op. at 6 (Bankr. E.D. Tenn. May 6, 2002). Specifically, with respect to the "additional circumstances" prong, the court found that

> . . . the Debtor is young, well-spoken, intelligent, and in possession of a master's degree. She is also underemployed and, despite her obvious potential, is presently in a professional situation where she is "bored" and able to do little more than "spin her wheels" financially. However, the court is confident that the Debtor has the ability and education to, with some help and aggressiveness on her part, move beyond her present condition. The court therefore cannot find those "additional circumstances . . . indicating that this state of affairs is likely to persist for a significant portion of the repayment period[.]"

Miller, slip op. at 6 (quoting *Hornsby,* 144 F.3d at 437).

With respect to whether the Debtor had, in good faith, attempted to repay the debt owed to the Defendant, the court considered the following factors:

> (1) the portion of the loan actually repaid by the debtor;
>
> (2) whether a debtor's failure to repay the obligation is truly from factors beyond the debtor's reasonable control;
>
> (3) whether the debtor has realistically used all her available financial resources to pay the debt;
>
> (4) whether the debtor has, in fact, attempted to repay the student loan at all;

> (5) the length of time after the student loan first becomes due that the debtor seeks to discharge the debt; and
>
> (6) the percentage of the student loan in relation to the debtor's total indebtedness.

Miller, slip op. at 7 (quoting *Wilcox v. Educ. Credit Mgmt. (In re Wilcox)*, 265 B.R. 864, 870 (Bankr. N.D. Ohio 2001)). After applying these factors, the court determined that

> [i]n the last five years, the Debtor has repaid a mere $368.00 of her student loan obligation while maintaining internet service, a high long distance bill, an unlimited-minutes cell phone plan, and cable television. In light of these indulgences, the court simply cannot find that the Debtor has made a good faith effort to repay her student loans.

Miller, slip op. at 8.

Nevertheless, the court found that the Debtor maintained a modest lifestyle and held that requiring her to maintain a 56-hour work week for twenty-five years to repay her student loans would "make her a slave to the loans and would deprive her of any future hope for financial independence." *Miller*, slip op. at 9. Accordingly, the court discharged "all interest, costs, and fees associated with the Debtor's student loans and . . . part of the principal, leaving in place a nondischargeable debt to [the Defendant] in the amount of $34,200.00, upon which no interest shall accrue." *Miller*, slip op. at 9. The court also set forth a repayment schedule.[2]

In its *Miller* opinion, the Sixth Circuit reiterated its reliance upon the *Brunner* test in determining undue hardship, with the following caveat:

> This court, however, has not formally adopted the *Brunner* test, and may look to other factors, including "the amount of the debt . . . [and] the rate at which interest is

[2] The Debtor was required to pay a minimum of $50.00 per month for the first twelve months, with her payments to then increase to at least $200.00 per month until the $34,200.00 balance was paid in full. All payments were to be made on or before the first day of each month. The Debtor did not ask the court for a stay pending appeal, and none was granted. Accordingly, the Debtor should have paid approximately $3,400.00 towards her student loan debt as of the date of this Memorandum.

> accruing" as well as "the debtor's claimed expenses and current standard of living, with a view toward ascertaining whether the debtor has attempted to minimize the expenses of [herself] and [her] dependents." *Hornsby*, 144 F.3d at 437 (quoting [*Rice v. United States (In re Rice)*, 78 F.3d 1144, 1149 (6th Cir. 1996)) (footnote omitted)] (first alteration in original). In addition, "the debtor's income, earning ability, health, educational background, dependents, age, accumulated wealth, and professional degree" may also be considered. *Rice*, 78 F.3d at 1149. Finally, a court may inquire into "whether the debtor has attempted to maximize [her] income by seeking or obtaining stable employment commensurate with [her] educational background and abilities." *Id.* at 1149-50.

Miller, 377 F.3d at 623 (footnote omitted). The Sixth Circuit then remanded the case to the court to determine if the Debtor met the undue hardship determination as to the Debtor's student loan obligation that the court partially discharged utilizing these factors as well as those previously addressed. *See Miller*, 377 F.3d at 624.

Based upon the evidence presented at trial, and pursuant to the Sixth Circuit's expanded analysis set forth in *Miller*, the court cannot find that it would impose an undue hardship upon the Debtor to repay any portion of her student loan debt to the Defendant. The Debtor acknowledged that she was underemployed, despite holding an advanced degree, and although the court found that it would be unfair to require her to work more than fifty hours per week at the two jobs she held at the time, the fact is that she has voluntarily remained in those positions, despite her boredom therewith. The Debtor has no dependents. She is in good health and suffers from no medical or emotional disabilities. Other than her lack of better employment, nothing prevents the Debtor from having the financial ability to repay her student loan debt. Furthermore, although the Debtor does not live a lavish lifestyle, she does not fully minimize her expenses. Instead, she budgets $130.00 per month in telephone charges, $45.00 for cable television, $25.00 for internet service, $45.00 for pet care, and $100.00 for speculative automobile maintenance. Even though the Debtor is not required to live a completely sparse lifestyle, she does not evidence any willingness to undergo further "belt-

tightening," despite the fact that doing so will allow her to make payments on her student loan obligations.[3]

Finally, and unquestionably, in the eighteen years following her first receiving student loans from the Defendant, the Debtor made no efforts to repay her student loans, from which she obtained a benefit in the form of undergraduate and graduate degrees. The court also finds it relevant that the Debtor never attempted to consolidate her student loans, and that she "admittedly filed bankruptcy in order to obtain a discharge of her credit card and student loan debts." *Miller*, slip op. at 4. The Debtor accomplished the goal of discharging $21,277.73 in unsecured and other student loan debt. Nevertheless, she did not make any good faith efforts to repay the student loan debt owed to the Defendant, and in light of the absence of additional circumstances that are likely to persist, the Debtor may not discharge any of the student loan debt owed to the Defendant.

Absent a finding of undue hardship, and pursuant to the Sixth Circuit's directives, the court may not use § 105(a) to partially discharge the Debtor's student loans based upon equitable considerations. Accordingly, the Debtor's entire student loan obligation owed to the Defendant is nondischargeable under § 523(a)(8).

[3] With the luxury of hindsight, the court points out that at the time of trial, the Debtor was making monthly payments of $210.00 to her parents for an automobile loan in the original amount of $6,000.00. At trial, she acknowledged that she had consistently made these payments throughout the course of her Chapter 7 bankruptcy case, and that in October 2001, the balance had been approximately $3,000.00. At that rate, the court can presume that the Debtor paid that debt to her parents in full in early 2003, also resulting in additional funds now available to service the student loan debt.

A judgment consistent with this Memorandum will be entered.

FILED: October 8, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE

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J U D G M E N T

For the reasons set forth in the Memorandum on Remand filed this date, it is ORDERED, ADJUDGED, and DECREED that the educational loans owing by the Plaintiff to the Defendant Pennsylvania Higher Education Assistance Agency/Student Loan Servicing Center are nondischargeable debts under 11 U.S.C.A. § 523(a)(8) (West 1993 & Supp. 2001).

ENTER: October 8, 2004

BY THE COURT

/s/ Richard Stair, Jr.

RICHARD STAIR, JR.
UNITED STATES BANKRUPTCY JUDGE